In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

Nos. 78-329, 78-330.

JANE HUNERWADEL,
APPELLANT IN 78-330,
FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS IN 78-329,
v.
WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329 AND 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief of the Defendant-Intervenor Jane Hunerwadel.

BRIAN A. RILEY,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240
Attorney for Intervenor.

Of Counsel:
THOMAS P. RUSSELL,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

Constitutional and Statutory Provisions.

MISCELLANEOUS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

Nos. 78-329, 78-330.

JANE HUNERWADEL,
APPELLANT IN 78-330,
FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS IN 78-329,

v.

WILLIAM BAIRD ET AL.,
APPELLEES IN NOS. 78-329 AND 78-330.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Brief of the Defendant-Intervenor Jane Hunerwadel.

This brief is submitted on behalf of Jane Hunerwadel, who was allowed to intervene in the District Court as representative of a class of parents having unmarried, minor girls who are or might become pregnant.

Opinions Below.

This is the second time that the Court has been required to review the constitutionality of the statute in question. The first decision of the District Court was issued by a divided court on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975). On July 1, 1976, in a decision reported at 428 U.S. 132 (1976), this Court unanimously vacated the order of the District Court and remanded the case so that questions could be certified to the Supreme Judicial Court of the Commonwealth of Massachusetts, concerning the interpretation of the statute in question. On January 25, 1977, the Supreme Judicial Court issued an opinion which is reported at Mass. Adv. Sh. (1977) 96, and 360 N.E. 2d 288 (1977), answering nine questions which had been previously certified by the District Court. On February 10, 1977, the District Court issued a divided opinion, reported at 428 F. Supp. 854 (D. Mass. 1977), enjoining enforcement of the statute as interpreted by the Supreme Judicial Court. After hearing further evidence, the District Court issued another divided opinion on May 2, 1978, permanently enjoining enforcement of the statute. This opinion is reported at 450 F. Supp. 997 (D. Mass.1978).

Jurisdiction.

This action for declaratory and injunctive relief was brought by the appellees under the provisions of 28 U.S.C. §§ 1331, 1343, 2201 and 42 U.S.C. § 1983 (App. I, 75). A three-judge court was convened pursuant to 28 U.S.C.

§§ 2281, 2284[1] (App. I, 2). The order of the District Court was entered on May 2, 1978 (App. I, 64-65). An amended order correcting a clerical error in the original order was entered on June 20, 1978. The intervenor filed her notice of appeal in the District Court on June 26, 1978 (App. I, 70). She filed her jurisdictional statement on August 25, 1978. On October 30, 1978, the Court noted probable jurisdiction and consolidated this appeal with the appeal filed by Attorney General Francis X. Bellotti in No. 78-329. The jurisdiction of this Court to review the order of the District Court is conferred by 28 U.S.C. § 1253.

Statutes Involved.

The District Court order declared § 12S of chapter 112 of the Massachusetts General Laws unconstitutional. Except for being renumbered from § 12P to § 12S in 1977, this is the same statute that was before the Court in *Bellotti* v. *Baird*, 428 U.S. 132 (1976). The District Court also declared unconstitutional all other sections of chapter 112 insofar as they make specific reference to § 12S. These sections, which are set forth below together with § 12S, are §§ 12Q, 12T and 12U.[2]

---

[1] The repeal of 28 U.S.C. § 2281 and the amendments to 28 U.S.C. § 2284 do not affect this appeal. See § 7 of the Act of August 12, 1976, P.L. 94-381, 90 Stat. 1120, providing: "This Act [repeal of 28 U.S.C. § 2281 and amendments to 28 U.S.C. § 2284] shall not apply to any action commenced on or before the date of enactment [enacted August 12, 1976]." This action was commenced on October 30, 1974 (App. I, 1).

[2] These sections were added as part of a comprehensive act to regulate abortions in the Commonwealth of Massachusetts. See Mass. St. 1974, c. 706. These sections were renumbered by Mass. St. 1977, c. 377, with certain corrective changes but no change in language. As a result, § 12N became § 12Q, § 12P became § 12S, § 12Q became § 12T and § 12R became

§ 12Q. Except in an emergency requiring immediate action, no abortion may be performed under sections twelve L[3] or twelve M[4] unless the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve S; and if the abortion is during or after the thirteenth week of pregnancy, it is performed in a hospital duly authorized to provide facilities for general surgery.

Except in an emergency requiring immediate action, no abortion may be performed under section twelve M unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent

§ 12U. These and other sections had to be renumbered because the Legislature had inadvertently assigned the same section numbers to different statutes. See *Bellotti* v. *Baird*, 428 U.S. at 134, n. 1.

[3]Section 12L is concerned with abortions performed prior to the twenty-fourth week of gestation. It requires such abortions to be performed by a physician and only if in his best medical judgment the abortion is necessary under all attendant circumstances.

[4]Section 12M is concerned with abortions performed after the twenty-fourth week of gestation. It prohibits physicians from performing an abortion after twenty-four weeks gestation except where it is necessary to save the life of the mother or would cause a substantial risk to the mother's physical or mental health.

is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

§ 12T. Any person who commits an act in violation of sections twelve O[5] or twelve P[6] shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve O or twelve P which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who willfully violates the provisions of sections twelve Q or twelve R[7] shall be pun-

[5]Section 12O imposes certain obligations on a physician who performs an abortion after 24 weeks of gestation under § 12M. It prohibits a physician using any abortion procedure designed to destroy the life of the unborn child unless in his best medical judgment other procedures would create a risk of death or serious bodily injury to the mother.

[6]Section 12P requires physicians to take reasonable steps to preserve the life and health of the aborted child when performing an abortion under § 12M.

[7]Section 12R sets forth certain filing requirements for physicians performing abortions and other matters relating to the collection of statistical information.

ished by a fine of not less than one hundred dollars nor more than two thousand dollars.

§ 12U. The attorney general or any person whose consent is required either pursuant to section twelve S or under common law, may petition for superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of section twelve I to twelve T, inclusive.

Question Presented.

Whether Mass. G.L. c. 112, § 12S, prohibiting physicians from performing abortions on unmarried, minor girls under the age of eighteen without parental consent or the consent of a judge of the Superior Court is unconstitutional on its face under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Statement of the Case.

I. The First Trial in the District Court.

The plaintiffs commenced this class action for declaratory and injunctive relief on October 30, 1974 (App. I, 2), just one day before § 12S was to take effect. The following day District Court Judge Frank H. Freedman issued a temporary restraining order enjoining enforcement of the statute pending a hearing by the court (App. I, 2).

The plaintiffs are Mary Moe, a fictitious name for a sixteen-year-old minor, unmarried girl, living at home with her

parents, who at the time of this action desired to have an abortion without informing her parents[8] (App. I, 78); Parents Aid Society (hereinafter Parents Aid), an abortion clinic (App. I, 79-80); William Baird, director of Parents Aid (App. I, 77-78); and Gerald Zupnick, M.D., a physician paid to perform abortions at Parents Aid[9] (App. I, 77-78; II, 176-77). The defendants are Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the District Attorneys for all the

[8] Mary Moe's testimony was impounded during the first trial and therefore was not included in the appendix. Neither the defendants, the intervenor, nor their attorneys know her true identity (Tr. 171). At the time this action was brought, she alleged by way of affidavit that she was about nine weeks pregnant and desired to have an abortion without informing her parents. Within several hours after the temporary restraining order was entered, Dr. Zupnick performed an abortion on Mary Moe at the abortion center operated by Parents Aid (Tr. 139, 142). Her parents were neither joined as parties to the action nor were they informed of the abortion. The court has refused to appoint a guardian to act in her behalf. *Baird I* at 850, n. 5. Mary Moe testified at trial, in camera, that although she had a close relationship with her parents and that her parents loved her and were concerned for her welfare (Tr. 149), she wanted the abortion because she felt that if her parents learned of her pregnancy, they would get upset and might take some action against the boy who made her pregnant (Tr. 162).

[9] Gerald Zupnick describes himself as a "contract physician" (App. II, 156). He performs abortions at centers operated by Parents Aid in both Boston and New York (App. II, 205). He is the only physician who performs abortions at Parents Aid in Boston (App. II, 160). He resides in New York and travels to Boston two days a week to perform abortions (App. II, 182). He is not affiliated with any hospital (App. II, 224). Although he occasionally sees other patients, the sole source of his medical income is from abortions performed at Parents Aid (App. II, 194). Dr. Zupnick is compensated by Parents Aid on the basis of a fee-splitting arrangement whereby he receives one-third of the fee paid for each abortion he performs (App. II, 176). At the time of the trial, his most recent check from Parents Aid in Boston for two days' work amounted to $600 (App. II, 177). He has received as much as $900 for a similar period (App. II, 205). Normally, he does not participate in the pre-abortion decision-making process (App. II, 159) and spends on the average a total of 5 to 7 minutes with each girl (App. II, 186-87). He does not require parental consent for minors who seek abortions and who do not desire to inform their parents (App. II, 190).

counties in the Commonwealth (App. I, 85). Jane Hunderwadel, who is the mother of three unmarried, minor girls, was permitted to intervene as a defendant and as representative of a class of Massachusetts parents having minor, unmarried daughters who are or might become pregnant (App. I, 5).

After a three-judge court was convened, the hearing on the preliminary injunction was merged with the hearing on the merits (App. I, 7). On December 9, 30 and 31, 1974, and January 28, 1975, the plaintiffs and defendants presented evidence including expert testimony on the medical, psychological and social problems associated with teenage pregnancies and abortions. During trial plaintiffs stipulated that they were challenging the statute only on its face and not as applied (App. II, 214). On April 28, 1975, the District Court issued a divided opinion declaring § 12S, and all other sections of chapter 112, insofar as they make specific reference thereto, unconstitutional (App. I, 13-14). An order was entered permanently enjoining enforcement of the statute. The majority indicated that the primary fault with the statute was that parents were "granted individual rights independent of the minor's best interests." *Baird* v. *Bellotti*, 393 F. Supp. 847, 857 (D. Mass. 1975) (*Baird I*). A lengthy dissent was filed by Senior District Judge Anthony J. Julian.

II. The First Appeal.

On July 1, 1976, this Court held that the statute was susceptible to an interpretation which "would avoid or substantially modify the federal constitutional challenge to the statute." *Bellotti* v. *Baird*, 428 U.S. 132, 148 (1976). The Court vacated the decision of the District Court on the ground that it "should have abstained pending construction of the statute by the Massachusetts courts," 428 U.S. at 146, and further held

that "the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of [§ 12S] and the procedure it imposes." 428 U.S. at 151. On remand, the District Court denied plaintiffs' application for stay of enforcement pending certification of questions to the Supreme Judicial Court.[10] However, on July 20, 1976, a single justice of this Court (Brennan, J.) granted a stay of enforcement. The Court later denied intervenor's application to vacate the stay. 429 U.S. 892 (1976).

III. Questions Certified to the Supreme Judicial Court.

On August 31, 1976, the District Court certified nine questions to the Supreme Judicial Court (App. I, 22, 23). The questions were concerned with the standards to be applied by the Superior Court in determining "good cause" and whether parental consultation was required in all cases. Other questions dealt with the appointment of counsel, criminal liability for physicians and the relationship of § 12S to other statutes dealing with medical treatment of minors.

---

[10] When the Court remanded the case to the District Court it seemed fairly clear that Court intended that the statute would go into effect. In *Bellotti* v. *Baird*, 428 U.S. at 151, the Court stated:

> The importance of speed in resolution of the instant litigation is manifest. *Each day the statute is in effect*, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. Further, in light of our disapproval of a "parental veto" today in [*Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976)], we must assume that the lower Massachusetts courts, if called upon to enforce the statute pending interpretation by the Supreme Judicial Court, will not impose the most serious barrier. (Emphasis added.)

On January 25, 1977, in *Baird* v. *Attorney General*, ____ Mass. ____, 360 N.E. 2d 288 (1977), the Supreme Judicial Court issued a comprehensive opinion answering all of the questions asked by the District Court. While not deciding the constitutional questions posed by the case, the court made every effort to interpret the statute in a manner consistent with the Constitution so as to give full effect to the announced legislative intent embodied in the title of the statute when it was initially enacted, i.e., "An Act to protect unborn children and maternal health within present constitutional limits." 360 N.E. 2d at 290; see Mass. St. 1974, c. 706, which added § 12S together with several other sections of the law. In so doing, the Supreme Judicial Court took specific note of the broad savings clause in Mass. St. 1974, c. 706, § 2, which provides that "[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act." 360 N.E. 2d at 291. Based upon this analysis, the Supreme Judicial Court prefaced its answers to the questions with the following statement:

> Our principal advice to the Federal District Court is that we would construe [§ 12S] to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of [§ 12S] potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principal that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

After reviewing each question in detail, the Supreme Judicial Court summarized its answers to the nine questions as follows:

> Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion. If the minor's parents (or their equivalent) are unavailable, parental consultation is not required. In deciding whether to consent to an abortion for their unmarried minor daughter, parents should consider only her best interests. If one or both parents refuse consent, a judge of the Superior Court may authorize an abortion for an unmarried minor if he rules that an abortion is in the minor's best interests. The parents, if available, must be notified of the court proceeding and must be allowed to participate in it. The judge in his discretion may appoint counsel or a guardian ad litem for the minor in the court proceeding. The court proceeding must be handled expeditiously. 360 N.E. 2d at 303.

IV. Further Hearings in the District Court.

After the District Court received the answers to the certified questions, the plaintiffs filed an amended complaint seeking preliminary and permanent injunctive relief enjoining enforcement of the statute as interpreted by the Supreme Judicial Court (App. I, 25). On February 10, 1977, after hearing arguments, a majority of the District Court granted a preliminary injunction enjoining enforcement of the statute (App. I, 27). Senior District Judge Anthony J. Julian again dissented. See *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*).

V. The Second Trial in the District Court.

During the period between February, 1977, and August, 1977, numerous motions were filed on matters relating to a further hearing before the District Court. These motions related primarily to discovery. Interrogatories and requests for admissions were made by the various parties (App. I, 30-50). After a pretrial conference on August 22, 1977, two more days of trial were held on October 17 and 18, 1977, when both parties presented more expert testimony to the court (App. I, 56).

On May 2, 1978, in *Baird* v. *Bellotti*, 450 F. Supp. 997 (D. Mass. 1978) (*Baird III*), the District Court issued the decision which is the subject matter of this appeal. In *Baird III* a majority of the court held that § 12S was unconstitutional for basically two reasons. First, the majority felt that the statute was unconstitutional because it required parental consultation in all cases where an unmarried, minor girl sought an abortion. 450 F. Supp. at 1000-1003. The second reason given by the majority was that the statute discriminated against so-called mature minor girls capable of giving an informed consent who under the statute could potentially be denied an abortion upon a finding by a Superior Court judge that an abortion would not be in their best interests. 450 F. Supp. at 1003-1004. The majority felt this was an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004. In reaching this decision, the majority rejected the Supreme Judicial Court's suggestion that the statute should be construed in a manner consistent with the Constitution. 450 F. Supp. at 1005-1006. Senior District Judge Anthony J. Julian again dissented. He felt that the requirement of parental consultation in all cases was proper. However, he agreed with the majority insofar as they held that the statute was invalid because it discriminated against

mature minors capable of giving an informed consent. 450 F. Supp. at 1015. But rather than voiding the entire statute, Judge Julian stated that he "would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable." 450 F. Supp. at 1015.

After the District Court issued its order enjoining enforcement of the statute, the court granted a motion to intervene filed on behalf of Planned Parenthood League of Massachusetts, the Crittenton Hastings House and Clinic and Philip G. Stubblefield (App. I, 69).

Argument.

I. The Statute is Constitutional on its Face.

A. *The Statute Reflects the Well Settled Principle that Parents Have the Primary Right and Duty to Guide and Protect their Minor Children.*

There is nothing more fundamental to our constitutional form of government than the institution of the family. It is on the family that all other social relationships depend. The family is the cornerstone of our society. Our political institutions are based upon a social system of family units, not isolated individuals. It is upon this system of family units that we rely for an orderly and cooperative interdependent society.[11] See Hafen, *Children's Liberation and the New*

---

[11] See *Doe* v. *Irwin*, 441 F. Supp. 1247, 1249 (W.D. Mich. 1977), stating:

> Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. No assumption

Egalitarianism: Some Reservations About Abandoning Youth to their "Rights," 1976 Brigham Young U. L. Rev. 604, 615-617.

In order to support the fundamental role of families, the law has imposed upon parents certain correlative rights and duties. Along with the duty to support, educate and maintain their minor children, parents have been accorded the correlative right to care for, guide and protect their minor children until the age of majority.

This Court has frequently held that the right and obligation of parents to guide and protect their minor children is a right protected by our Constitution. In *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the Court noted that the right to liberty guaranteed by the Fourteenth Amendment includes the right "to marry, establish a home and bring up a family." Two years later, in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court reaffirmed the liberty of parents to direct the upbringing of their children by holding that parents have the right to choose whether their children will be educated in a private or public school. In *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972), the Court stated: "The history and culture of

---

> more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, with whom to raise a family, and, in broad measure, what values and beliefs to inculcate in the children who will later exercise rights and responsibilities of citizens and heads of families. . . .
>
> . . . [T]he family unit does not simply co-exist with our constitutional system; it is an integral part of it. In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on to determine group directions. The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.

Quoting Hafen, at 617, cited in text, *supra*.

Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." See also *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 843-844 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494, 503-504 (1977); *Roe* v. *Wade*, 410 U.S. 113, 152-153 (1973); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). The intervenor recognizes, however, that the right of parents to rear their children is not absolute and that the state may regulate the family in the best interests of minor children. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (state may enact child labor laws). But, as the Court stated in *Prince*, "[i]t is cardinal . . . that the care, custody and control of [children] reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166.

The Massachusetts statute in question is in accord with this body of law. Consistent with these cases, the statute requires the minor girl to seek the consent of her parents before obtaining an abortion. In so doing, the statute insures that the minor girl consults with her parents so that they have the opportunity to fulfill their obligation to provide guidance and assistance to their child during a most difficult time in her life. If the parents refuse to grant consent to the abortion, the statute provides a mechanism for a judge of the Superior Court to determine whether or not an abortion is in the best interests of the child. This statutory scheme is parallel to the approach taken by the Court in *Prince*.

B. *The Statute does Not Infringe upon a Minor's Right to Obtain an Abortion.*

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), this Court, by a vote of five-to-four, held that a state could not enact a statute which required a minor girl to obtain parental consent as an absolute prerequisite for obtaining an abortion. In so doing, Justice Blackmun, joined by Justice Brennan and Justice Marshall, noted that the Court's decision should "not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." 428 U.S. at 75. The Court further stated that the fault with such a statute "is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without sufficient justification." 428 U.S. at 75.

The key to the *Planned Parenthood* decision is found in the concurring opinion of Justice Stewart, joined by Justice Powell, which made it clear that a statute requiring parental consultation would be constitutionally permissible. Justice Stewart stated:

> With respect to the state law's requirement of parental consent, § 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti* v. *Baird*, 428 U.S. 132, 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to

> give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.
>
> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place. 428 U.S. at 90-91. (Footnotes omitted.)

Justice White, joined by the Chief Justice and Justice Rehnquist, dissented and indicated that, in their opinion, the parental consent provision contained in the Missouri statute was constitutional. Justice White stated:

> The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions; and there is absolutely no reason expressed by the majority why the State may not utilize that method here. 428 U.S. at 95.

Justice Stevens, who also dissented, stated:

> A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision. 428 U.S. at 104.

The intervenor contends that the Massachusetts statute, as interpreted by the Supreme Judicial Court, is constitutional under *Planned Parenthood*. The statute does not give parents an unbridled veto, but rather insures that parents are given the opportunity to consult with their minor daughter in the event that she becomes pregnant. The statute insures that any disagreement between the minor girl and her parents will be resolved in an expeditious manner before a judge of the Superior Court. It further provides that the court must grant consent if the abortion is in the minor's best interests. See *Baird* v. *Attorney General*, 360 N.E. 2d at 293.

C. *The Statute Serves Rational as Well as Compelling State Interests.*

The intervenor contends that the Massachusetts statute must be upheld as long as it is rationally related to a valid state interest. "[T]he relevant question in any case where state laws infringe upon the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests." *Carey* v. *Population Services International*, 431 U.S. 678, 707 (1977) (Powell, J., concurring); *Maher* v. *Roe*, 432 U.S. 404 (1977). The intervenor contends that the statute serves rational as well as compelling state interests.

1. The Need for Emotional Support and Guidance.

By requiring minor girls to seek parental consent in the first instance, the statute insures that minor girls will obtain the emotional support that only a parent can provide when a minor is faced with a pregnancy. Both plaintiffs' and defendants' experts unanimously agreed that a pregnant minor girl undergoes a great deal of emotional stress and that parental support and involvement is extremely important and should be encouraged in every instance[12] (App. II, 44, 47, 51-52, 103-

---

[12] Defendants' expert, Dr. Yerkes, testified as follows (App. II, 249-50):

Q Doctor, you mentioned that people are important to the adolescent. What did you have in mind there?

A The adolescent depending upon age lives in two worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons.

Q What are those reasons?

A The first reason is that an unwanted pregnancy involves an emotional crisis of at least a month to six weeks duration. There is a waiting decision to be made by the adolescent. Though the adolescent in certain ways may be clear upon what decision would be best for her, I think that on the one hand it puts an undue emotional strain, the strain of responsibility upon that individual to make a decision alone. I think having the family involved and the family and that individual working through a decision together that the teenager feels as though they have support in their decision, and that they have come and arrived at the best decision possible.

I think that without the family being involved, the family is not prepared to support that individual through the crisis of three to six weeks following a therapeutic interruption of pregnancy, and there is the most important matter of making one's peace with the decision that has been made.

I have had certain experience, a couple of cases of the family finding out later and feelings coming out, "Well, you made that decision. You live with it."

Where you have the family making the decision, everyone is committed to carrying out that decision ultimately.

104, 137, 226, 249). The statute insures that the minor girl seeks and obtains the parental support and assistance that can help her through probably the first major crisis in her life. It is important that the minor make the right decision for the right reasons. Furthermore, depending upon the age of the minor girl and the circumstances of the pregnancy, the parents can commence immediate steps to deal with the root causes of the pregnancy. By not informing the parents of the pregnancy, the child's needs in this regard could go undiscovered and unresolved[13] (App. II, 250).

2. Selection of a Physician and Medical Facility.

The parental consent provision also insures that a minor girl will have the assistance of her parents[14] in selecting the physi-

[13]See Nadelson, *Abortion Counselling: Focus on Adolescent Pregnancy*, 54 Pediatrics 6:765, 769 (1974) (App. I, 232-33):

> For the adolescent, failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided. It is important to remember that the pregnant adolescent is a child potentially bearing a child.

[14]The intervenor, Mrs. Hunerwadel, testified at trial concerning the role she and her husband would play in the event that one of her children desired to have an abortion. Her testimony is as follows (App. II, 270-271):

> Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?
>
> A. Yes, there are.
>
> Q. Tell us what those circumstances would be.
>
> A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about

cian and medical facility to perform the abortion.[15] The need for proper guidance in this decision should not be underesti-

> the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.
>
> We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.
>
> We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done was one which had adequate services all around, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.
>
> We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.
>
> And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.
>
> So those kinds of decisions would be very important to us to help her to make.

[15]An abortion is not a simple, uncomplicated procedure as plaintiffs seem to imply. A first trimester abortion performed by vacuum aspiration is classified as a surgical procedure and involves a serious bodily intrusion for a minor girl (App. II, 70-71).

As Dr. Zupnick testified, this procedure involves the insertion of a speculum, dilators and the nozzle of the aspirator into the vagina and uterus of the girl (App. II, 185-186). It involves the use of anesthesia (App. II, 186), and the procedure is followed by bleeding which usually lasts two or three days but may last as long as ten days or more (App. II, 207). Moreover, there is the risk of complications. The physical complications which may

mated.[16] As it is true with all professions, the quality of medical care can vary widely from physician to physi-

result from an abortion include perforation of the uterus, which can cause sterility, and fever or pain, which is indicative of infection (App. II, 66-67). There is also an increased risk in subsequent pregnancies of premature deliveries, spontaneous mid-trimester abortions and faulty implantation with subsequent errors in placental development (App. II, 219-220). Moreover, if the girl has blood type of RH-negative, an injection of RHO-gram serum must be given within 72 hours of the abortion or there is a risk that subsequent pregnancies could result in the birth of what is commonly known as a "blue baby" (App. II, 203-204). About 15 per cent of the population have a blood type of RH-negative (App. II, 203).

[16] Recently, two female reporters from the *Chicago Sun-Times* conducted an investigation into Chicago-area abortion clinics. Some of their findings, which were summarized in *Time*, November 27, 1978, at 52, are as follows:

> Doctors perform abortion procedures on women who are not pregnant.
>
> Operations are performed by inexperienced or unqualified people, including moonlighting hospital residents and at least one doctor who lost his license to practice in another state, and is appealing a similar decision by Illinois.
>
> Clinics are run under unsanitary conditions, and use haphazard procedures. This has sometimes led to severe infections and internal damage that later requires the patient to have a hysterectomy. In one clinic the staff cleaned procedure rooms between patients by wiping up blood with wet tissues. One doctor . . . went from one abortion to the next without washing his hands or donning sterile gloves. Another doctor . . . performed an abortion while a nurse gave him what the *Sun-Times* described as a "sensual massage," and on another occasion did several procedures after drinking champagne at a clinic party.
>
> Some clinics use an assembly-line system in which doctors perform operations within three minutes (a safe abortion usually takes about 15), do not administer anesthetics or do not wait for them to take effect, and race each other to see who can perform the most operations in a day. According to the investigators, [one of the doctors investigated] may provide the fastest and most painful abortions in Chicago. He makes a pencil mark on the leg of his scrub suit for each abortion and tallies them up at the end of the day. In their haste, doctors often fail to remove all the necessary tissue. Sometimes they perforate the uterus or vagina.

cian[17] and from medical facility to medical facility. It is extremely important that the minor girl receive proper counseling and medical care. It is common knowledge that most minor girls simply do not have the experience to make informed decisions concerning the relative abilities of physicians.

II. The Statute is Narrowly Drawn to Serve the Best Interests of Minor Girls.

A. *What the Statute does Not Cover.*

It is important to view the statute not only in reference to the situations it covers but also in reference to the situations that it does not cover. First, under Mass. G.L. c. 12, § 12Q, the statute does not apply in the event of an emergency. Second, the statute only applies to unmarried girls under the age of eighteen. It does not apply to married girls. Cf. *Carey* v. *Population Services International*, 431 U.S. 678, 707-708 (1978) (Powell, J., concurring) (statute held unconstitutional because it prohibited distribution of contraceptives to minors

> Clinics are also guilty of shoddy record keeping; falsifying records of patients' vital signs; failing to order postoperative pathology reports; and ignoring, scrambling or losing results of lab tests.
>
> Women are not counseled to consider carefully their decision to have an abortion. Instead, they are sold on the operation through high-pressure tactics and false information. At [one of the clinics], telephone operators were told: "We have to corral the patients."

[17] The selection of a competent, sensitive and ethical physician is not as easy as one may like to think. When plaintiffs' expert, Dr. Sturgis, was asked whether he was aware of doctors who perform surgical operations based on personal beliefs, such as aversion to welfare, population control and their conception of what was an ideal family, he responded, "I am certainly aware of all sorts of doctors who are not following the code" (App. II, 69-70).

except by physician even though minor girl is married). Third, the statute only applies to girls under the age of eighteen. It should be remembered that up until the early 1970's many states still used twenty-one as the age of majority.[18]

B. *The Statute as Interpreted by the Supreme Judicial Court is Sufficiently Narrow so as Not to Infringe on the Rights of Minor Girls.*

In *Baird* v. *Attorney General, supra,* the Supreme Judicial Court went to great lengths to interpret the statute in a manner so as to avoid unduly intruding into the right of a minor to obtain an abortion. First, and perhaps most importantly, the court held that, in determining "good cause," a judge of the Superior Court may only consider only the best interests of the minor girl and "must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests." 360 N.E. 2d at 292. Second, the court held that the Superior Court would act expeditiously and that steps would be taken to insure confidentiality. These two factors distinguish the Massachusetts statute from other statutes which have been held to be overly burdensome. See *Doe* v. *Rampton*, 366 F. Supp. 189 (D. Utah 1973) (statute required a judicial hearing on voluntariness of a minor's consent even when minor's parents consented to the abortion).

C. *The Statute's Requirement of Parental Consultation is Not Overly Burdensome.*

The plaintiffs have contended, and the District Court held, that the Massachusetts statute is unconstitutional because it

[18] Massachusetts lowered the age of majority from twenty-one to eighteen in 1973. See Mass. St. 1973, c. 925, § 1, amending Mass. G.L. c. 4, § 7, *forty-eighth* through *fifty-first.*

requires a minor girl to consult her parents in all cases where she desires to obtain an abortion. The District Court held that some parents are physically or emotionally unwell or would oppose a minor's right to seek the consent of a judge of the Superior Court. In so doing, the Court stated:

> Parents have many years, however, to offer guidance, and to indicate support. However surprised an individual parent may be to find a daughter pregnant, given the present high incidence of pregnancy, the possibility seems too great for concerned parents to disregard until it happens. If the family relationship is such that communication has not been attempted, or successful, before pregnancy we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. *Baird III*, 450 F. Supp. at 1003.

This statement directly contradicts the well-established principle that parents are presumed to act in the best interests of their minor children. The District Court seems to take the view that a last-minute consultation with the physician is better than a last-minute consultation with the parents. See dissenting opinion of Julian, J., 450 F. Supp. 1006. Parental consultation is something that should be encouraged because parents are the ones most likely to provide the love and support that the young girl so desperately needs. The record in this case clearly establishes that parental notification is in the minor's best interests except in rare instances (App. II, 104, 139). In the usual case, a minor's fears about notifying her parents are not realized in fact (App. II, 104, 139).

In view of the evidence presented on the issue of parental notification, the intervenor contends that the statute is constitutional on its face. The statute should be "judged by

reference to characteristics typical of affected classes rather than by focusing on selected, atypical examples." *Califano* v. *Jobst*, 434 U.S. 47, 55 (1977). In view of the fact that the plaintiffs limited their constitutional challenge to a facial attack on the statute, the statute should be upheld. However, to the extent that the Court perceives any constitutional defect with respect to parental consultation, it should place a limiting construction on the statute in accordance with the opinion of the Supreme Judicial Court.

D. *The Statute does Not Unconstitutionally Discriminate Against Mature Minor Girls Capable of Giving an Informed Consent.*

The only other reason advanced by the District Court for invalidating § 12S relates to mature minors capable of giving an informed consent. It found "no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent." 450 F. Supp. at 1004. The District Court found this to be an "undue burden in the due process sense, and a discriminatory denial of equal protection." 450 F. Supp. at 1004.

The point at issue here is the Supreme Judicial Court's answer to a question concerning the standard to be applied by the Superior Court in determining whether to give consent to an abortion. The Supreme Judicial Court stated as follows:

> Question 2(b) concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances,

> but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact. 360 N.E. 2d at 293.

The intervenor contends that the "best interests of the minor" test propounded by the Supreme Judicial Court is constitutionally permissible. The mere fact that a minor girl may be capable of understanding the mechanics of a medical procedure such as a therapeutic abortion does not necessarily mean that the minor girl has the intellectual and emotional ability to make a decision which serves her long term best interests. As Justice Stevens stated, concurring in *Planned Parenthood*:

> In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible. 428 U.S. at 104.

Nevertheless, even if such a distinction was found to be constitutionally impermissible, the District Court was not justified in invalidating the entire statute. The Supreme Judicial Court specifically stated that the statute be construed in such a manner as to render it constitutional. It stated:

> If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we

should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. 360 N.E. 2d at 292.

The majority of the District Court rejected this advice and declared the entire statute unconstitutional. Judge Julian in his dissenting opinion stated that he would not declare the entire statute unconstitutional but rather would strike out the provision in question and allow "a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion." 450 F. Supp. at 1016.

Conclusion.

For reasons stated herein, the intervenor requests that the Court reverse the order of the District Court.

Respectfully submitted,

BRIAN A. RILEY,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240
Attorney for Intervenor.

Of Counsel:

THOMAS P. RUSSELL,
Suite 520,
40 Court Street,
Boston, Massachusetts 02108.
(617) 523-3240